BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CORY WILLINGHAM	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,048,327
	)	
CITY OF TOPEKA	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the May 3, 2011, Award and the January 13, 2012, Second Order Upon Remand[1] entered by Administrative Law Judge Brad E. Avery.[2] The Board heard oral argument on April 10, 2012. George H. Pearson, of Topeka, Kansas, appeared for claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for the self-insured respondent.

In the May 3, 2011, Award, the Administrative Law Judge (ALJ) found claimant was a full-time employee with a 40-hour work week and a wage of $9.50 per hour. Accordingly, he found claimant's preinjury average weekly wage (AWW) was $380. The ALJ found the rating opinion of Dr. Peter Bieri to be more credible than the rating opinions of Dr. Philip Baker and Dr. Edward Prostic and that claimant had a 7 percent whole body functional impairment and disability. The ALJ also found that claimant was entitled to a work disability of 71.34 percent based on a 100 percent wage loss and a 42.67 task loss. The ALJ computed claimant's task loss by averaging the task loss opinions of Drs. Bieri, Baker and Prostic. The Award was appealed by respondent and on August 10, 2011, the Board entered an Order remanding the matter for a ruling by the ALJ on respondent's objection to the admission of Dr. Bieri's opinions concerning claimant's task loss. In an Order Upon Remand filed August 12, 2011, the ALJ overruled respondent's objection to the inclusion of Dr. Bieri's task loss opinion as being part of the record. Respondent appealed the Order Upon Remand to the Board, and in an Order entered January 10, 2012, the case was again remanded to the ALJ with instructions to either enter an award granting or denying

[1] The Second Order Upon Remand was undated, but it was filed on January 13, 2012.

[2] There was a first Order Upon Remand dated August 12, 2011.

compensation or to adopt his original Award of May 3, 2011. In his Second Order Upon Remand, the ALJ incorporated his order of August 12, 2011, overruling respondent's objection to the inclusion of Dr. Bieri's testimony, into the Award he had entered on May 3, 2011.

The Board has considered the record and adopted the stipulations listed in the Award. Further, the Board has considered the parties' Stipulation filed March 14, 2011, and the Stipulation filed April 25, 2011.

ISSUES

Respondent requests review of the ALJ's findings concerning claimant's AWW and whether claimant received an overpayment of temporary total disability benefits. Further, respondent asks the Board to review the nature and extent of claimant's disability. Respondent objects to the task loss opinion of the court-ordered independent medical examiner, Dr. Bieri, being considered as part of the record. Respondent further asks the Board to review whether claimant had preexisting disability as contemplated under K.S.A. 2009 Supp. 44-501(c) and if so, determine the amount of claimant's preexisting disability.

Claimant contends he was a full-time employee who was expected to be available to work 40 hours a week. Claimant also asserts the ALJ properly found a work-related injury to his lumbar spine and that he is entitled to a work disability based on a 100 percent wage loss. Accordingly, claimant asks that the Award of the ALJ be affirmed in its entirety.

The issues for the Board's review are:

(1) What was claimant's preinjury AWW? Was claimant a part-time hourly employee or a full-time hourly employee?

(2) Was there an overpayment of temporary total disability benefits based on either AWW or the number of weeks for which compensation was paid? What was the correct compensation rate? When did claimant reach maximum medical improvement?

(3) What is the nature and extent of claimant's disability? Is claimant's injury and impairment to a scheduled member or to the body as a whole? Is respondent entitled to an offset or credit for preexisting impairment?

(4) Did the ALJ exceed his authority or err in overruling respondent's objection to the inclusion in the record of Dr. Bieri's task loss opinion and report? Did claimant's counsel violate the ALJ's no-contact order with the court-appointed independent medical examination physician?

FINDINGS OF FACT

Claimant testified he responded to a newspaper advertisement in the Topeka Capital-Journal in which respondent advertised for street maintenance workers. The advertisement indicated it was seeking individuals "to work 40 hours per week through October 15th for general labor work."[3] In April 2009, claimant was hired for one of the positions in the street department and was paid $9.50 per hour with no fringe benefits except overtime paid at time and a half.

Kathy Fritz, the office manager of respondent's Transportation Operations, initiated the newspaper advertisement by completing a Request for Temporary or Seasonal Employee(s) after she was told the department needed eight temporary employees to perform street repairs. When completing the request form, she indicated the positions would be designated as temporary full time. Jackie Russell, respondent's Human Resources Director, testified that the position for which claimant applied and was hired was actually a temporary part-time position, regardless of what had been marked on the request form. Respondent's policy is that temporary workers may only work up to 1,040 hours per year, which respondent considers to be part time.[4] Ms. Russell said part time versus full time is based on the number of hours anticipated to be worked per year rather than per day or week. The temporary employees would be paid only for the number of hours they worked and would work for 40 hours a week, depending on the weather. Claimant, however, considered himself to have been a full-time employee. He testified that during his interview, he was told he would be working 40 hours a week and sometimes more.

During the 26-week period claimant worked for respondent, he earned a total of $7,604.76.[5] Of that amount, $21.38 was overtime wages. He worked from as little as 8 hours per week to as many as 41 hours. If claimant is determined to be a part-time employee, his AWW would be the average of the amount he earned working for respondent for the 26-week period, or $292.49. If claimant is determined to be a full-time employee, albeit only a temporary employee, his AWW would be $380.82 per week ($9.50 x 40 = $380 plus $21.38 ÷ 26 or $0.82).

Claimant was paid a total of $6,583.62 in temporary total disability benefits from November 10, 2009, through June 11, 2010, a period of 30.57 weeks. For the first several

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[3] Russell Depo., Ex. 4 at 2.

[4] Russell Depo. at 37.

[5] Stipulation of parties filed April 25, 2011, Ex. 1.

weeks, claimant was paid at the rate of $253.89, but the compensation rate was reduced to $195 per week beginning January 23, 2010.[6]

On November 9, 2009, claimant was dumping boxes of tar into a paving machine when the machine rolled onto his right foot and stopped. Claimant testified he tried to extricate himself by jerking his leg. Claimant said his right foot was hurting because of the heavy pressure on it, and he also had pain in his right leg and low back. He did not remember how long the machine was on his foot. Claimant was wearing steel-toed shoes. He said he continued to work the rest of the day but was given the job of driving an asphalt truck rather than dumping tar into the paving machine.

Claimant testified that the day after the accident, he called his supervisor and told him his back and foot were in pain. He said his supervisor told him to go to St. Francis Hospital for treatment. Claimant testified he told the hospital personnel about his back pain, but they concentrated on his right foot.[7] He was sent to Dr. Mead for treatment, who treated his low back complaints by sending him to physical therapy and water therapy. Claimant was sent to Dr. Nicolae, who gave him facet joint injections in his low back. He was sent to Dr. Wade Welch, a neurologist, who performed nerve conduction tests. He was eventually sent to Dr. Michael Smith, who sent him to physical therapy for work hardening. Dr. Smith released claimant from care on April 20, 2010. Claimant testified he still has symptoms in his back that radiate down his right leg.

Sometime after his release from treatment by Dr. Smith, claimant returned to respondent and asked about going back to work. He was told respondent no longer needed him for the position with the street department but told him he could apply for other openings with respondent. However, claimant did not qualify for the openings that were available. He has not found employment since his termination. At the time of the regular hearing, he testified he hoped to start a laundry service.

Claimant testified he had never had any low back problems before this accident. Claimant did not remember that an ALJ authorized treatment of his low back with a chiropractor as a result of a 1998 workers compensation injury. Claimant said he never received a settlement in the 1998 workers compensation claim because the respondent in that case went out of business. Claimant said he abandoned his medical treatment because respondent could not pay any more and he did not have his own personal insurance.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on June 1, 2010, at the request of claimant's attorney. Claimant told Dr. Prostic his right foot

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[6] Stipulation of parties filed March 14, 2011.

[7] The hospital records were not made a part of the record.

was run over by a truck and then the bumper of the truck pushed his right thigh, causing him to fall over.

Dr. Prostic performed a physical examination on claimant. He did not find claimant had any calf atrophy. The straight-leg raising test was negative bilaterally. Claimant's MRI and EMG were both negative, and none of the x-rays taken by Dr. Prostic showed any abnormalities. Claimant had normal reflexes and no obvious muscle spasm. In testing claimant's range of motion of the lumbar spine, Dr. Prostic found in forward flexion, claimant reached to 2 inches from his toes, which Dr. Prostic described as a minimal loss of range of motion. Claimant had complete extension and rotation. He found claimant had loss of lateral flexion left and right. Dr. Prostic mentioned in his report of June 1, 2010, that claimant appeared to have a symptom-magnification disorder. Dr. Prostic did not think claimant was a malingerer. Dr. Prostic thought it more likely claimant was having an abnormal psychological reaction.

When Dr. Prostic saw claimant on June 1, 2010, he hoped claimant would have some improvement. But a few days later, claimant's attorney asked him whether claimant would be at maximum medical improvement (MMI) if he had no more medical treatment, and Dr. Prostic answered that if claimant did not have any more medical treatment, he would be at MMI. However, he also thought claimant would perhaps improve if he were to have antidepressant medicines and an exercise program.

Dr. Prostic generated a second report dated June 11, 2010, in which he rated claimant as having a 10 percent permanent partial impairment to the body as a whole[8] using the DRE model of the AMA *Guides*.[9] He also referred to language in the *Guides* that allows the examiner to adjust the rating to something that is the equivalent of the range of motion model. Dr. Prostic said if he had strictly used the DRE model, claimant would have been in Category II for a 5 percent impairment rating because he did not have proof of lumbar radiculopathy. But Dr. Prostic said claimant had treatment, including injections, and continued to have poor function of his low back. He said claimant had the equivalent of a lumbar radiculopathy. Dr. Prostic admitted the minimal flexion and loss of lateral flexion left and right would not justify a 10 percent rating. He also admitted the loss of range of motion could be preexisting. However, Dr. Prostic believed the greatest likelihood is that claimant had normal range of motion prior to the 2009 accident and his loss of motion was the result of the work-related accident.

Dr. Prostic said claimant may have piriformis syndrome, a sciatica caused by trapping of the sciatic nerve at the piriformis muscle. The basis for this opinion is that

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[8] Dr. Prostic did not see claimant a second time but based his rating and restrictions on the June 1, 2010, examination.

[9] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

claimant told him he fell in the accident.[10] Claimant told Dr. Prostic he had fallen backwards, and Dr. Prostic said claimant had tenderness right where the sciatic nerve would exit the piriformis muscle.

Dr. Prostic opined that claimant was capable of only light to medium level employment with only part time standing or walking. He said he should have added restrictions of no frequent stooping, bending, twisting, pushing and pulling. He opined that claimant should only work from four to six hours a day. Dr. Prostic reviewed the task lists prepared by Dick Santner and opined that claimant would be unable to perform 28 of the 36 tasks for a task loss of 78 percent.

Dr. Phillip Baker, a board certified orthopedic surgeon, examined claimant on October 19, 2010, at the request of respondent. Claimant told Dr. Baker a dump truck had driven onto his right foot. Claimant believed the truck was on his foot about 12 seconds before it backed off and he was freed. Claimant told Dr. Baker that during the time his foot was pinned under the truck, he twisted and fell to the ground, injuring his right foot area and his low back.

Dr. Baker evaluated claimant's back and lower extremities. He found claimant had reduced range of motion in the right mid foot area. Claimant felt discomfort when he attempted to move the foot from side to side while holding the heel and ankle in a locked position. Those were the only abnormalities Dr. Baker found in claimant's foot. Dr. Baker reviewed x-rays taken of claimant's spine by Dr. Smith and said there was no evidence of any instability of the spine on those x-rays. In examining claimant's back, Dr. Baker said he noticed claimant had a slight C-curve in his spine. Claimant had complaints of discomfort when Dr. Baker pushed on his lumbosacral area. Claimant also said he was tender in the right sciatic notch. Straight leg raising was normal. Claimant's reflexes were okay, and Dr. Baker found no atrophy or motor weakness. Using x-rays,[11] he measured claimant's legs and found his right leg was 6 millimeters shorter than the left leg. Dr. Baker said if a person has a short leg of that type, he will also have a curve in his back to compensate. Dr. Baker diagnosed claimant as having reduced motion in his foot and mild degenerative disease in his lumbar spine.

Using the AMA *Guides*, Dr. Baker rated claimant as having a 4 percent permanent partial impairment of the right lower extremity and a 5 percent whole body impairment for his lumbar spine. Dr. Baker, however, did not believe claimant's spine impairment was related to the accident of November 9, 2009. Dr. Baker said that in reviewing the medical records, he found no mention of back involvement in the early phases of claimant's

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[10] Claimant's description of the accident at the regular hearing did not mention that he fell, only that he jerked on his leg to get it out from under the tire of the vehicle. However, claimant told Drs. Prostic, Baker and Bieri that he fell during the incident.

[11] This test is called a scanogram.

treatment. Also, Dr. Baker said there was a lack of strong information that anything really went on with claimant's back other than falling to the ground. He opined that claimant's preexisting condition of a curved spine and short leg fit more with claimant's back problems.

Dr. Baker said the St. Francis emergency room records hardly give any credibility to claimant's foot injury. Dr. Baker did not think claimant jerking on the foot and twisting to free his foot for 12 seconds would hurt either his back or foot. Dr. Baker said claimant did not report an injury to his back for 10 days. He said normally if a person is hurt, he would know it at least by 24 hours after the incident. Dr. Baker stated: "I don't think there was–my opinion, I don't think it was that much of an injury. There was an injury, I concur, to the foot. I gave him the benefit in there was some restriction of motion; therefore, he had a sprain of the foot."[12]

On cross-examination, Dr. Baker agreed with claimant's attorney that claimant could have injured his back when the truck rolled onto his foot and he was knocked to the ground, tried to yank his foot out from under the truck, and twisted his back. He also agreed if claimant told his medical providers that his back and leg were both hurt immediately in the accident and the medical providers did not record his back complaints, then claimant's back condition would be related to the accident.

Dr. Baker reviewed the task lists prepared by Mr. Santner. Of the 36 tasks on the lists, he opined that claimant could perform all but 1 for a task loss of 3 percent. The only task he did not believe claimant could perform was No. 3, operate a jackhammer to break up concrete. Dr. Baker said that task involved lifting 90 pounds frequently, which he would not recommend claimant perform because he was a "relatively small man."[13] He thought claimant could lift 90 pounds occasionally.

Dr. Peter Bieri, a board certified independent medical examiner, examined claimant on October 12, 2010, at the request of the ALJ. Claimant gave him a history that a company truck ran over his right foot and then he fell backward, injuring his right foot and thigh. Claimant complained of pain involving his low back, made worse with repetitive bending, lifting or twisting. Claimant told Dr. Bieri he had pain that radiated into the right hip and thigh, depending on his level of activity, as well as dysesthesia involving his right lower extremity.

Dr. Bieri performed range of motion testing and found them to be normal, except that claimant's range of motion in extension for his lumbar spine was less than normal. He did not find any atrophy in the lower extremities. Tendon reflexes were normal in the lower

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[12] Baker Depo. at 79.

[13] Baker Depo. at 18.

extremities. Claimant had a slight decrease in sensation along the dorsum of his right foot extending into four toes but not the big toe. He reviewed an MRI that showed desiccation at the L3-4 disc. He believes that was claimant's only structural abnormality. He believes the structural abnormality was degenerative in nature. Dr. Bieri acknowledged that the injury claimant described could make the desiccated L3-4 disc symptomatic. Dr. Bieri did not note any curvature of claimant's spine. He reviewed a scanogram that showed claimant's left lower extremity is longer than the right. He said that under the AMA *Guides*, any limb length discrepancy of less than 2 centimeters would not meet the criteria for lower extremity impairment. Claimant's discrepancy was 6 millimeters, so there would be no impairment secondary to limb length discrepancy for the lower extremity. Dr. Bieri diagnosed claimant with mechanical low back pain and post traumatic right foot pain and sensory disturbance.

Using the AMA *Guides*, Dr. Bieri rated claimant as having a 2 percent whole person impairment for dysesthesia involving the dorsum of the right foot. As for the back injury, he placed claimant in DRE Category II, having a 5 percent whole person impairment for complaints of pain, the clinical history, and examination findings that were compatible with a specific injury or illness. Claimant's combined impairment was 7 percent to the body as a whole. Dr. Bieri said claimant gave a history of back pain subsequent to the work-related injury, and the findings were inclusive in DRE Category II. Claimant did not testify at the regular hearing that he had fallen. But Dr. Bieri said he did not think he would change his rating even if claimant did not fall.

When claimant was seen by Dr. Bieri, he was not being treated and was not taking any prescription medication. Dr. Bieri believed claimant should be seen by a medical care provider who could provide him with future treatment of medication and/or injections.

Dr. Bieri recommended claimant have restrictions to limit occasional lifting to 50 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds constant lifting. Twisting and bending should be performed no more than frequently. Sustained weight-bearing and ambulation should be limited to 3 hours at a time, with 15 minutes for postural adjustment. Based on the DOT, claimant's restrictions fall within the medium work category. Dr. Bieri reviewed the task lists prepared by Mr. Santner. Of the 36 tasks on the lists, he opined that claimant is unable to perform 17 for a task loss of 47 percent.

Dick Santner, a vocational rehabilitation counselor, interviewed claimant on June 4, 2010, at the request of claimant's attorney. He prepared a list of tasks claimant had performed in the 15-year period before his injury of November 9, 2009. After issuing a report of July 6, 2010, he met with claimant a second time on February 14, 2011, and supplemented the task list. In all, there were 36 tasks on the lists. Claimant was not employed when he met with Mr. Santner on June 4, 2010. Mr. Santner did not ask claimant on February 14, 2011, whether he was employed on that date.

Mr. Santner was not aware that claimant claimed to have been a house husband for the years between 1996 and 2004. Mr. Santner said he would not include the tasks claimant performed when off work to be a house husband in a list of tasks for employers. He has never included homemaking activities in a task list.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2009 Supp. 44-511 states in part:

> (a)(4) The term ‘‘part-time hourly employee’’ shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.
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> (5) The term ‘‘full-time hourly employee’’ shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.
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> (b) The employee’s average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:
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> . . . .
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> (4) If at the time of the accident the employee’s money rate was fixed by the hour, the employee’s average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work

involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

(5) If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. . . .

K.S.A. 44-510d(a) states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(14) For the loss of a foot, 125 weeks.

(15) For the loss of a lower leg, 190 weeks.

. . . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.A.R. 51-7-8 states in part:

(a)(1) If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries.

. . . .

(c)(4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

K.S.A. 2009 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[14] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[15] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[16]

K.S.A. 44-516 states:

> In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

K.A.R. 51-9-6 states:

> If a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record of hearing. Either party may cross examine each neutral physician so employed. The fee of the neutral physician giving such testimony shall be assessed as costs to a party at the administrative law judge's discretion.

ANALYSIS

In his Award of May 3, 2011, the ALJ made findings of fact and conclusions of law that are accurate and well supported by the record. The Board adopts those findings and conclusions as its own except as specifically modified below.

The Board finds claimant was a full-time hourly employee of respondent. Although the work was seasonal and not necessarily permanent, claimant was expected to be

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[14] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[15] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[16] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

available and work 40 hours or more a week on a regular basis, weather permitting. As such, his gross preinjury AWW was $380.82.

Based upon an AWW of $380.82, claimant's compensation rate is $253.89. Claimant reached MMI and was released from care by Dr. Smith on April 20, 2010. Claimant is entitled to temporary total disability compensation from the day following the date of accident through April 20, 2010, a period of 23.14 weeks. There was an overpayment of temporary total disability compensation of $708.61, which will be offset against the award of permanent partial disability compensation in the award calculation.

The Board agrees with and affirms the ALJ's findings as to the nature and extent of claimant's permanent impairment of function and work disability. The Board likewise agrees with the ALJ that Dr. Bieri's opinions are part of the record and were properly considered by the ALJ.

CONCLUSION

(1) As a full-time hourly employee, claimant's preinjury gross average weekly wage was $380.82.

(2) Claimant is entitled to 23.14 weeks of temporary total disability compensation at the rate of $253.89 per week for a total of $5,875.01.

(3) As a result of his November 9, 2009, accident, claimant has a 7 percent permanent impairment of function to the body as a whole and a permanent general (work) disability of 71.34 percent. Respondent failed to prove that claimant had a ratable preexisting impairment of function.

(4) Claimant's counsel did not violate the ALJ's no-contact order with the court-appointed independent medical examination physician. Respondent's objection to the opinions of Dr. Bieri is overruled.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award entered May 3, 2011, and the Second Order Upon Remand entered January 13, 2012, by Administrative Law Judge Brad E. Avery, are modified to find claimant's gross preinjury average weekly wage was $380.82, which yields a compensation rate of $253.89, and that claimant is entitled to 23.14 weeks of temporary total disability compensation but is otherwise affirmed.

Claimant is entitled to 23.14 weeks of temporary total disability compensation at the rate of $253.89 per week or $5,875.01, followed by 290.25 weeks of permanent partial disability compensation at the rate of $253.89 per week or $73,691.57 for a 71.34 percent work disability, making a total award of $79,566.58.

As of May 3, 2012, there would be due and owing to the claimant 23.14 weeks of temporary total disability compensation at the rate of $253.89 per week in the sum of $5,875.01 plus 106.29 weeks of permanent partial disability compensation at the rate of $253.89 per week in the sum of $26,985.97 for a total due and owing of $32,860.98, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $46,705.60, shall be paid at the rate of $253.89 per week for 183.96 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge